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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LUCE, FORWARD, HAMILTON &
SCRIPPS, LLP,

Plaintiff and Respondent,

v.

PHILLIP P. FERREIRA,

Defendant and Appellant.

D054700

(Super. Ct. No. P185520)

APPEAL from an order of the Superior Court of San Diego County, Gerald J. Jessop, Judge. Affirmed.

Appellant Phillip P. Ferreira hired respondent Luce, Forward, Hamilton & Scripps, LLP (Luce Forward), in 2005 to represent him in a litigation involving the Ferreira Family Living Trust (Trust) that commenced in 2003 in San Diego County Superior Court, Probate Division. Luce Forward subsequently sued Ferreira in San Diego County Superior Court to recover its fees. In August 2008, Ferreira stipulated to judgment for Luce Forward in the sum of \$90,625.

After entry of the stipulated judgment, Luce Forward filed a petition in the probate court to enforce its judgment against Ferreira. Specifically, Luce Forward sought an order that its judgment against Ferreira be charged as a lien against his interest as a beneficiary in the Trust assets.

Ferreira moved to dismiss the petition, claiming the probate court lacked personal jurisdiction over him because, he argued, Probate Code section 17003 bars a court from exercising jurisdiction over a trust beneficiary if the trust's principal place of administration is outside California.

The probate court denied Ferreira's motion to dismiss, finding Ferreira consented to jurisdiction in 2005 when he filed (through his then-counsel Luce Forward) a petition to remove the trustee and appoint a successor trustee of the Trust, among other pleadings and petitions.

Ferreira appeals the denial of his motion to dismiss. Luce Forward separately claims Ferreira's appeal is frivolous and seeks \$10,000 in sanctions against Ferreira and/or his counsel.

As we explain, we conclude the probate court did not err when it denied Ferreira's motion to dismiss for lack of personal jurisdiction. We also conclude Ferreira's appeal is frivolous and order Ferreira and his attorney, Peter Shenass, to pay jointly and severally, sanctions as follows: (1) \$6,600 to Luce Forward, which is the amount of attorney fees Luce Forward (conservatively) expended in connection with this appeal, and (2) \$2,500 to the clerk of this court, as compensation to the taxpayers of this state for the expense of processing, reviewing and deciding a frivolous appeal.

FACTUAL AND PROCEDURAL BACKGROUND¹

The facts are not in dispute. In November 2003, successor trustee James Duberg, a San Diego attorney, filed on behalf of the Trust a petition for instructions and for appointment of a guardian ad litem in San Diego County Superior Court, Probate Division, case No. P185520 (probate action). Ferreira is one of several beneficiaries of the Trust. Since 2003, the Trust has been the subject of ongoing litigation that has continued at least through late February 2009, when the probate court denied Ferreira's motion to dismiss that is the subject of this appeal.

In 2005, Ferreira retained Luce Forward to represent his interests as a beneficiary in the probate action. On behalf of Ferreira, Luce Forward filed in the probate action an application for a determination that Ferreira's proposed petition to remove the trustee (Duberg) and for other relief would not violate the no-contest clauses contained in the Trust. Luce Forward also filed an objection to the trustee's petition for instructions and a petition to remove and surcharge the trustee based on his alleged breach of trust in the probate action.

For reasons not clear from the record, at some point Luce Forward discontinued representing Ferreira in the probate action and later sued him for its fees in San Diego County Superior Court, case No. 37-2007-00071746-CU-CL-CTL (debtor action). Ferreira and Luce Forward subsequently entered into a stipulated judgment in the debtor

¹ Certain facts are discussed *post*, in connection with our discussion of Ferreira's motion to dismiss for lack of personal jurisdiction.

action, in which Ferreira agreed to pay Luce Forward \$90,000 in "damages" and \$625 in "costs" for a total judgment of \$90,625.

To satisfy its judgment in the debtor action, Luce Forward filed a petition in the probate action seeking an order charging Ferreira's interest in the Trust assets. Ferreira responded through his attorney, Peter Shenass, by filing a motion to dismiss the petition for lack of personal jurisdiction. He argued he was "specially appear[ing] [in the probate action] to object to the jurisdiction of this Court over him as a beneficiary of the . . . Trust and for dismissal of the [p]etition on that ground." Despite the fact Ferreira hired Luce Forward in 2005 to represent his interests as a beneficiary in the probate action, Ferreira now claimed the probate court lacked jurisdiction over him because the "principal place of administration" of the Trust, as used in Probate Code section 17003, subdivision (b), was outside California because the then-two cotrustees of the Trust—Ferreira and his sister, Nita Vance Ferreira²—neither resided in California nor conducted business in California.

Pursuant to Code of Civil Procedure section 128.7, Luce Forward served Ferreira with a notice to withdraw his motion to dismiss or face sanctions. Ferreira did not withdraw his motion.

Following oral argument, the probate court affirmed its tentative ruling and denied Ferreira's motion to dismiss. The court found "no merit" to Ferreira's argument that it lacked jurisdiction over him. In reviewing its own records in the probate action, the court

² It is unclear from the record when Duberg was relieved as trustee of the Trust and ultimately replaced by Ferreira and his sister.

found Ferreira in November 2005 filed "*in this court* a 'Petition for Removal and Surcharge of Trustee for Damages and for Breach of the Trust, and for Appointment of Successor Trustee.' The caption of the pleading stated that this Petition was 'In the Matter of the 1990 Ferreira Family Living Trust, as Amended[,] and '[i]n the first paragraph of the Petition, it states: 'Petitioner, Philip P. Ferreira, in his capacity as a beneficiary of the 1990 Ferreira Family Living Trust, as Amended, presents herewith his Petition' [¶] Therefore, there can be no question that if the court had no personal jurisdiction over Ferreira under the Probate Code or other Code for whatever reason, Ferreira consented to this Court's jurisdiction over him back in 2005 over matters related to the instant Trust, which this action against him by his former attorneys surely is, especially given that the judgment creditor, Luce Forward, Hamilton & Scripps, LLP, is none other than the attorneys who filed the above-referenced Petition" [o]n Ferreira's behalf." (Italics added.)

DISCUSSION

Ferreira argues the probate court erred when it found he consented to its jurisdiction and denied his motion to dismiss for lack of personal jurisdiction because the court's ruling is contrary to Probate Code section 17003.

Luce Forward contends Ferreira's appeal is meritless because (1) the denial of a motion to dismiss is not an appealable order, (2) he stipulated to the entry of judgment and cannot now challenge that judgment on appeal, and (3) Probate Code section 17003 does not limit or trump California's long-arm statute, Ferreira consented to the court's

jurisdiction and his contacts with California are, in any event, sufficient to make the exercise of jurisdiction over him reasonable.

A. Nonappealable Order

Ferreira in his opening brief states the trial court's order denying his motion to dismiss for lack of jurisdiction is an appealable post-judgment order under Code of Civil Procedure section 904.1, subdivision (a)(2), which provides: "(a) An appeal, other than in limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following: [¶] . . . [¶] (2) From an order made after a judgment made appealable by paragraph (1)."

Although Ferreira filed his motion to dismiss after he stipulated to entry of judgment against him, as Luce Forward correctly notes that judgment was from the debtor action, from which there is no right to appeal. (See *Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1387 ["a party cannot appeal from a judgment to which [the party] has stipulated"]; *Delagrang v. Sacramento Sav. & Loan Assn.* (1976) 65 Cal.App.3d 828, 831 [appeal dismissed where appellant stipulated to the court's judgment of dismissal].) In contrast, in the probate action—which is the subject of the instant appeal—there has been no judgment. Thus, the order denying the motion to dismiss for lack of jurisdiction is not an order made after an appealable judgment for purposes of Code of Civil Procedure section 904.1, subdivision (a)(2).

Ferreira, therefore, was required to seek review by writ petition. Given the unorthodox nature of his motion to dismiss, it is not clear whether review would have been by statutory writ (see, e.g., Code Civ. Proc., § 418.10, subds. (a)(1) and (c)

[governing review of the denial of a defendant's *motion to quash service of summons* on the ground of lack of personal jurisdiction]) or by common law (e.g., Code Civ. Proc., § 1085 [writ of mandate]).³ We need not, however, resolve this issue because Ferreira did not seek review by writ petition.

Nonetheless, under limited circumstances this court has the discretion to treat an appeal from a nonappealable order as a petition for writ relief and determine the merits of the challenge to the order. (*Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1006; *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) However, we exercise such discretion only under "extraordinary circumstances." (*Coronado Police Officers Assn. v. Carroll, supra*, 106 Cal.App.4th at p. 1006; *H. D. Arnaiz, Ltd. v. County of San Joaquin, supra*, 96 Cal.App.4th at pp. 1366-1367.) Ferreira has not attempted to show "extraordinary circumstances," nor does our review of the record show such circumstances exist here.

In reaching this conclusion, we reject Ferreira's argument his instant appeal is appropriate and timely because there was "no later opportunity to appeal" Luce Forward's petition because no trial on the petition was contemplated. However, the order from which Ferreira appeals is the denial of his motion to dismiss for lack of jurisdiction, and not the ruling on the petition itself. If the court subsequently grants the petition, we cannot discern any reason why Ferreira would be precluded from raising that issue then in a writ petition or in a subsequent appeal from a judgment in the probate action.

³ As discussed *post*, the fact Ferreira filed a motion to dismiss for lack of personal jurisdiction is further evidence of his consent to the general jurisdiction of the court.

In sum, we conclude no extraordinary circumstances exist here to treat his appeal as a writ petition. Because Ferreira has appealed from a nonappealable order, we must dismiss his appeal. (See *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645; accord, *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 ["A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment."])

B. Consent to Jurisdiction

Even if the order denying Ferreira's motion to dismiss was properly before us, on this record we would have little difficulty concluding he was subject to the probate court's jurisdiction. Ferreira claims the probate court lacked jurisdiction over him as a beneficiary of the Trust because the "principal place of administration" of the Trust, as that term is used in Probate Code section 17003, subdivision (b), is outside California.

Subdivision (b) of Probate Code section 17003 states: "*Subject to [Probate Code] Section 17004: [¶] . . . [¶] To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this division.*" (Italics added.) Probate Code section 17004 provides: "The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure."⁴

⁴ Code of Civil Procedure section 410.10, California's long-arm statute, states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

The term "principal place of administration" is defined in the Probate Code as the "usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust." (Prob. Code, § 17002, subd. (a).) However, "*If the principal place of administration of the trust cannot be determined under subdivision (a), it shall be determined as follows: [¶] (1) If the trust has a single trustee, the principal place of administration of the trust is the trustee's residence or usual place of business. [¶] (2) If the trust has more than one trustee, the principal place of administration of the trust is the residence or usual place of business of any of the cotrustees as agreed upon by them or, if not, the residence or usual place of business of any of the cotrustees.*" (Prob. Code, § 17002, subd. (b), italics added.)

Ferreira argues it is "clear" that the place of administration of the Trust is not in California because the co-trustees of the Trust, Ferreira and his sister, Nita Vance Ferreira, neither reside in California nor is it their residence or usual place of business.

Ferreira's argument conveniently skips over Probate Code section 17002, subdivision (a), and ignores completely the fact Duberg as trustee filed the probate action *in California*. Indeed, Duberg alleged in the 2003 petition for instructions and for appointment of a guardian ad litem that the "Superior Court of the State of California has exclusive jurisdiction of this proceeding pursuant to Cal. Probate Code section 17000(a) because it concerns the internal affairs of a trust. The San Diego Superior Court, Probate Division, is the proper venue for this proceeding pursuant to Cal. Probate Code sections 17002 and 17005 because San Diego County is the principal place of administration of

the trust. Specifically, San Diego County is the usual place where the day-to-day activities of the [T]rust are carried on by the successor trustee, who is primarily responsible for the administration of the [T]rust." Duberg verified under penalty of perjury he read the contents of the petition for instructions and for appointment of a guardian ad litem and certified its contents were both true and correct and based on his own personal knowledge.

We conclude California is the principal place of administration of the Trust. (See Prob. Code, § 17002, subd. (a).) Thus, we further conclude under Probate Code section 17003, subdivision (b), that the beneficiaries of the Trust were then subject to the jurisdiction of the probate court to the extent of their interests in the Trust. Because there is no question the probate court had jurisdiction over the beneficiaries in 2003, we cannot accept Ferreira's proposition that the court somehow was divested of that jurisdiction during the pendency of the probate action merely because the successor trustee of the Trust was replaced by Ferreira and his sister while the Trust was being administered. Nor does Ferreira offer any legal support for such a novel rule, other than citing to the "clear language" of the Probate Code.

In any event, we decline Ferreira's invitation to adopt such an interpretation of the term "principal place of administration" of a trust, for purposes of Probate Code sections 17002, subdivision (a), and 17003, subdivision (b), and conclude the rule proposed by Ferreira would lead to absurd consequences the Legislature could not possibly have intended. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Finally, Ferreira does not explain why Probate Code section 17004 does not govern here, in light of the fact Probate Code section 17003 is expressly made "subject to" that statute, and in light of the evidence in the record showing Ferreira (through Luce Forward) filed various petitions in the probate action and stipulated to judgment in the debtor action.

Independent of whether the Trust was, and continues to be, administered in California for purposes of Probate Code sections 17002, subdivision (a), and 17003, subdivision (b), we conclude from the record Ferreira's conduct subjected him to general jurisdiction in this state, inasmuch as he actively participated in both the probate and debtor actions, as recently demonstrated by his filing of the motion to dismiss in the probate action that is the subject of this appeal. (See, e.g., Prob. Code § 17004; *Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1397 [a defendant consents to jurisdiction if a general appearance is made in the California action, and a general appearance occurs where the defendant, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed]; *California Overseas Bank v. French American Banking Corp.* (1984) 154 Cal.App.3d 179, 184 [if a defendant " 'raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction' " over the defendant, the appearance is general].) Thus for this separate and independent reason, we reject Ferreira's argument the probate court did not have personal jurisdiction over him in connection with Luce Forward's petition.

C. *Sanctions on Appeal*

Luce Forward filed a motion under California Rules of Court, rule 8.276, subdivision (a)(1), and Code of Civil Procedure section 907,⁵ seeking \$10,000 in sanctions against Ferreira and/or his attorney, Peter Shenan, for pursuing a frivolous appeal.⁶ Luce Forward argues Ferreira's appeal is "so frivolous that it could not have been filed for any reason other than to harass [Luce Forward] and potentially delay enforcement of the judgment to which [Ferreira] stipulated."

The definition of a frivolous appeal was provided by our high court over 20 years ago as follows: "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).)

To determine whether an appeal is frivolous, the *Flaherty* court identified two standards, either of which, if satisfied, is sufficient for such a determination. (*Flaherty, supra*, 31 Cal.3d at pp. 649-650.) The subjective standard "looks to the motives of the

⁵ California Rules of Court, rule 8.276, subdivision (a)(1), authorizes a reviewing court to impose sanctions upon an offending attorney or party for "[t]aking a frivolous appeal or appealing solely to cause delay." Code of Civil Procedure section 907 likewise provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

⁶ In connection with its motion for sanctions, Luce Forward filed an unopposed request for judicial notice, which we grant.

appellant and his or her counsel"; the objective standard, in contrast, "looks at the merits of the appeal from a reasonable person's perspective." (*Id.* at p. 649.) Under the objective standard, " '[t]he problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' " (*Ibid.*)

We are aware that sanctions should be sparingly used to "deter only the most egregious conduct" (*Flaherty, supra*, 31 Cal.3d at p. 651), and that merely because an appeal lacks merit does not, alone, establish it is frivolous. (See *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.) This appeal, however, goes far beyond an appeal lacking in merit.

As we have noted, the probate court clearly had personal jurisdiction over Ferreira beginning in 2003 when successor trustee Duberg filed the probate action in San Diego County to administer (and ultimately, distribute the assets) of the Trust. Ferreira himself recognized that jurisdiction when he retained Luce Forward to represent his interests in the probate action and filed various petitions and pleadings in that court. Under penalty of perjury, Ferreira stated he read and knew the contents of the various petitions, including the fact the Superior Court of California had jurisdiction over the Trust "because San Diego County *is* the principal place of administration of the Trust." (Italics added.)

What's more, Ferreira participated in the debtor action and stipulated to judgment for Luce Forward in that action. His participation in the debtor action is further evidence

of his intention to be subject to the general jurisdiction of the courts of this state. (See *California Overseas Bank v. French American Banking Corp.*, *supra*, 154 Cal.App.3d at p. 184.) We thus conclude no reasonable attorney could have contemplated that Ferreira's appeal of the probate court's order denying his motion to dismiss for lack of personal jurisdiction would be meritorious under the facts of this case.

There remains, however, the issue of the amount of sanctions and who should pay them. Sanctions for filing a frivolous appeal are intended to compensate for expenses occasioned by the appeal and to deter similar conduct in the future. (*Flaherty*, *supra*, 31 Cal.3d at p. 647.) The amount of attorney fees reasonably incurred in responding to a frivolous appeal is one possible measure of sanctions. (See *In re Marriage of Economou* (1990) 223 Cal.App.3d 97, 108.) Another possible measure is the cost imposed on the court system by the waste of time and resources in processing and deciding a frivolous appeal. (See *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 343 ["A recent conservative estimate of the cost to the state of processing an average civil appeal is \$6,000."].)

Here, in its motion for sanctions Luce Forward proffered evidence that it has spent in excess of \$6,600 preparing respondent's brief. This sum does not include the expense of preparing the motion for sanctions or for appearing at the oral argument on the appeal. We find the attorney fees Luce Forward incurred in connection with this appeal to be reasonable, and thus assess sanctions of \$6,600 jointly and severally against Ferreira and his attorney, Peter Shenan (who has been involved in the probate action from the very

beginning).⁷ In light of the undue burden this appeal has placed on the legal system and the consumption of this court's precious resources, we also impose an additional \$2,500 sanction jointly and severally against Ferreira and his attorney, Peter Shenan.

DISPOSITION

The order of the probate court denying Ferreira's motion to dismiss for lack of personal jurisdiction is affirmed. We find Ferreira's appeal to be frivolous and assess sanctions against him and his attorney, Peter Shenan, jointly and severally, as follows: (1) sanctions in the amount of \$6,600, due and payable to Luce Forward within 30 days of the issuance of the remittitur in this matter; and (2) sanctions in the amount of \$2,500 for the cost to the taxpayers of processing this frivolous appeal, which sum shall be due

⁷ Peter Shenan is not a newcomer to the probate action. In the petition for instructions filed in 2003, the successor trustee noted another one of the trustor's adult sons, Stephen Vaughn Ferreira, "insisted on retaining a particular attorney (*Peter Shenan, Esq.*) to represent him with regard to matters pertaining to his interest as a beneficiary of the trust The trustee pointed out to Stephen Ferreira that this particular attorney had a conflict of interest because *he had represented the trustor* [who died in April 2001] . . . *in the preparation and drafting of the original trust and in relation to many other business and legal matters.* The trustee encouraged Stephen Ferreira to obtain different counsel. Stephen Ferreira did not accept this advice Eventually, arrangements were made for attorney Shenan to provide legal representation to Stephen Ferreira under a modified conflict waiver arrangement. Attorney Shenan has attempted to represent and counsel Stephen Ferreira, including attending a meeting of the successor trustee and counsel for the beneficiaries on August 20, 2003. The successor trustee has attempted to work with attorney Shenan to enable Stephen Ferreira not to disinherit himself." (Italics added.)

and payable to the clerk of this court also within 30 days of the issuance of the remittitur.

In addition to the award of sanctions, Luce Forward is entitled to its costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.